

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers |) | CC Docket No. 01-338 |
| |) | |
| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 |) | CC Docket No. 96-98 |
| |) | |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability |) | CC Docket No. 98-147 |
| |) | |

**OPPOSITION OF SBC TO
AT&T CORP. PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's rules, SBC¹ opposes AT&T Corp.'s (AT&T's) petition for reconsideration of the Commission's *MDU Reconsideration Order*.²

In the *Triennial Review Order*, the Commission drew a fundamental distinction between the ILECs' legacy narrow-band networks and next-generation broadband facilities. Recognizing that new entrants stand largely on the same footing as ILECs when it comes to deployment of broadband, and that forced sharing of those facilities would undermine incentives for both ILECs and new entrants to deploy them, the Commission embraced a "new investment, new rules" philosophy, and largely relieved ILECs of the obligation to unbundle broadband facilities.³

¹ SBC Communications Inc. files these comments on behalf of itself and its operating company affiliates, including: Southwestern Bell Telephone, L.P.; Nevada Bell Telephone Company; Pacific Bell Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; Wisconsin Bell, Inc.; and The Southern New England Telephone Company.

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *et al.*, *Order on Reconsideration*, 19 FCC Rcd 15856 (2004) ("*MDU Reconsideration Order*").

³ In particular, the Commission found that the barriers to deployment of new fiber facilities and the potential revenue opportunities from such deployment are the same for both ILECs and CLECs. *See, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") at para. 240, *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied, NARUC v. United States Telecom Ass'n.*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004). The Commission also found that ILEC broadband services and facilities are subject to intermodal competition. *Id.* at

Among other things, the Commission ruled that ILECs need not unbundle fiber loops that extend to the customer's premises (*i.e.*, fiber-to-the-home or FTTH loops) in greenfield (*i.e.*, new build) situations, and that, in brownfield (or overbuild) situations, ILECs may either provide unbundled access to a 64kbps voice-grade transmission path over the fiber loop or to a spare copper loop.⁴

In the *MDU Reconsideration Order*, the Commission sought to build on its “new investment, new rules” philosophy by extending the unbundling relief for fiber loops to FTTH loops deployed to multiple dwelling units (MDUs) that are predominantly residential. In that order, the Commission concluded that its decision in the *Triennial Review Order* to lump all multi-tenant environments together for purposes of unbundling was overly broad, and that, consistent with the requirements of section 706, a more nuanced approach to unbundling was appropriate.⁵ In particular, it found that extending the unbundling relief for FTTH loops to predominantly residential MDUs was “necessary to ensure that the regulatory disincentives for broadband deployment are removed for carriers seeking to serve those customers – residential customers – that pose the greatest investment risk.”⁶

The Commission decided to include predominantly residential MDUs in its FTTH rules for several reasons. First, it found that residential customers in MDUs typically are served over copper loops today, and that the investment risk and disincentives faced by carriers seeking to deploy broadband to single family dwellings applies equally to predominantly residential MDUs.⁷ In this context, the Commission reasoned, retaining the regulatory disincentives associated with unbundling could cause ILECs to shift any investment in fiber networks from

paras. 245-246. The Commission concluded that, in this context, requiring ILECs to unbundle such facilities would undermine ILEC and CLEC incentives to make risky investments in broadband infrastructure, imposing significant social costs that would not be offset by any potential benefits of unbundling. *Id.* at paras. 211-213.

⁴ *Triennial Review Order* at paras. 275-277.

⁵ *MDU Reconsideration Order* at para. 4-5.

⁶ *Id.* at para. 5.

⁷ *MDU Reconsideration Order* at para. 7.

residential MDUs to markets with less investment risk, contrary to the requirements of section 706.⁸

Second, the Commission found that a more nuanced approach to unbundling for multi-tenant environments was both possible and appropriate. In particular, it found that a categorical approach would either retain the regulatory disincentives to broadband deployment for millions of residential customers in MDUs or eliminate unbundling for enterprise customers for whom, the Commission found, unbundling was not a disincentive to deployment.⁹ The Commission concluded that it could draw a workable distinction between predominantly residential MDUs and other multiunit environments, and that the statutory goal of encouraging deployment of broadband to all residential customers (including those in MDUs) outweighed whatever impairment might be present for fiber loops serving such customers.¹⁰ In so doing, the Commission expressly rejected the arguments of AT&T and others that unbundling relief should never apply to any multiunit premises.¹¹

The Commission also specifically rejected claims by AT&T and others that the Commission's analysis of impairment with respect to MDU inside wiring precludes unbundling relief for fiber loops serving MDUs.¹² In the *Triennial Review Order*, the Commission justified lumping mass market customers in MDUs in with enterprise customers based on concerns about CLEC access to inside wiring owned by ILECs.¹³ In the *MDU Reconsideration Order*, however,

⁸ *Id.* at para. 8.

⁹ *Id.* at para. 8. SBC does not agree with the Commission's conclusion that forced sharing would not create disincentives to deploy next generation broadband facilities and services to enterprise customers. At a minimum, requiring ILECs to unbundle such facilities raises ILEC deployment costs and decreases the potential revenue ILECs can earn on such investment. Moreover, forced sharing of such facilities undermines CLEC incentives to build out to the very customers they are most likely to serve with their own facilities, contrary to the goals of the Act.

¹⁰ *Id.* at paras. 8, 5.

¹¹ *Id.* at para. 8.

¹² *Id.* at para. 9, citing, *inter alia*, AT&T Comments at 19.

¹³ *Triennial Review Order* at para. 197, n. 624; *See also* paras. 351-355.

the Commission acknowledged that these concerns were “fully” ameliorated by its decision in the *Triennial Review Order* to grant CLECs access to inside wiring, NIDs and other subloops in multiunit premises,¹⁴ and thus rejected CLEC claims that any purported impairment with respect to MDU inside wire justified forced sharing of broadband facilities deployed to predominantly residential MDUs.

In its petition, AT&T argues that the Commission’s decision to extend its unbundling relief for FTTH loops to predominantly residential MDUs is “unwise, unlawful, and should be reconsidered.”¹⁵ In so doing, AT&T offers no new facts or analysis to support its position. Rather, it merely rehashes arguments made by AT&T and others in their comments and reply comments – arguments that already have been rejected by the Commission, and rightly so. Absent any new facts or persuasive reason for altering its decision (which are wholly lacking here), the Commission should again reject AT&T’s arguments and deny its petition.

First, AT&T’s claim that the *MDU Reconsideration Order* represents a fundamental departure from the *Triennial Review Order* rests upon a mischaracterization of both orders. Contrary to AT&T’s claims, the *Triennial Review Order* did not limit unbundling of FTTH loops based solely on a finding of no impairment with respect to such loops; nor did the *MDU Reconsideration Order* eliminate unbundling for FTTH loops to predominantly residential MDUs despite its “reaffirmation” of impairment for such loops. Rather, in both orders, the Commission found that whatever impairment existed could be adequately addressed by targeted unbundling requirements, and that the section 706 goal of encouraging deployment of broadband outweighed whatever remaining impairment might exist.

In the *Triennial Review Order*, for example, the Commission granted unbundling relief for FTTH loops not only in greenfield situations, as AT&T claims, but also in brownfield

¹⁴ *MDU Reconsideration Order* at para. 9, citing *Triennial Review Order* at paras. 343-358.

¹⁵ AT&T Petition at 3.

situations, where it found some impairment *might* exist.¹⁶ But, rather than requiring blanket unbundling of fiber in brownfield situations, the Commission adopted narrowly targeted unbundling requirements to address the potential for impairment in those situations – specifically, it gave ILECs a choice of either maintaining existing copper loops or providing access to a 64 kbps path over the FTTH loop.¹⁷ Likewise, in the *MDU Reconsideration Order*, the Commission acknowledged that the *Triennial Review Order* treated mass market customers in MDUs different from other mass market customers based on concerns about the ability of CLECs to access inside wiring,¹⁸ and noted that its inside wire unbundling requirements would alleviate whatever impairment might exist with respect to mass market customers in MDUs: “We retain competitive LECs’ rights under the *Triennial Review Order* to unbundled access to inside wiring, NIDs, and other subloops for multiunit premises, which fully addresses that impairment.”¹⁹ Consequently, the Commission did not impermissibly depart from its prior approach to unbundling in the *MDU Reconsideration Order*, as AT&T implies; rather, the Commission simply recalibrated its unbundling analysis to conform to its earlier approach of establishing *targeted* requirements.

AT&T’s claim that section 706 is inapt is equally unavailing. Here, AT&T maintains that requiring ILECs to unbundle fiber to residential MDUs would not limit ILEC incentives to deploy such loops.²⁰ The Commission has already concluded otherwise. As the Commission recognized, deploying fiber to serve residential customers (including those living in MDUs)

¹⁶ *Triennial Review Order* at para. 276-277. The Commission expressed doubt that CLECs would be impaired even in an overbuild situation because, as with greenfield deployments, CLECs and ILECs largely face the same obstacles in building FTTH loops (both must obtain materials, hire labor, and build fiber facilities), and the revenue opportunities associated with FTTH loops are greater for both ILECs and CLECs, “weakening the case for unbundling.” *Id.* at para. 276.

¹⁷ *Triennial Review Order* at para. 277.

¹⁸ *MDU Reconsideration Order* at para. 9; *see also Triennial Review Order* at para. 197 n.624; *See also* paras. 351-355.

¹⁹ *Id.*

²⁰ AT&T Petition at 6-7.

poses great investment risk because the demand for broadband services by such customers is uncertain. This uncertainty is heightened by the fact that most MDUs already are served by a cable or other provider of video services that are capable of providing broadband services to residents. Thus when ILECs deploy broadband facilities to these same premises, the risk of uncertain consumer demand is heightened by the fact that they must win customers away from one or more entrenched competitors. That is why independent manufacturers have observed that requiring ILECs to share their investment in broadband facilities would undermine their incentives to deploy such facilities, or encourage ILECs to shift their investment in broadband to markets with lower investment risks or fewer investment disincentives.²¹

In any event, while section 706 provides *added* support for the Commission's decision, the decision stands on its own based on the lack of impairment. As the Commission recognized, the one-third of the population currently living in MDUs typically are served today over copper loops at the DS0 level.²² That is because ILECs have not yet built fiber facilities out to the vast majority of residential MDUs. As a consequence, as with FTTH deployments for other mass market customers, incumbent LECs have no first mover advantage in deploying fiber to predominantly residential MDUs. Moreover, as the Commission acknowledged, its inside wire unbundling requirements address whatever purported competitive disadvantage CLECs might confront in accessing customers in residential MDUs. That being the case, impairment is lacking.

AT&T's claim that the Commission's *MDU Reconsideration Order* is too broad insofar as it extends the FTTH rules to enterprise customers in predominantly residential MDUs is frivolous. As an initial matter, SBC vehemently disagrees that CLECs are impaired in their ability to deploy fiber to predominantly commercial buildings. As SBC showed in its reply comments in the *Triennial Review Remand* proceeding, only a small fraction of commercial

²¹ See High Tech Broadband Coalition Comments at 12; *see also* Telecommunications Research and Action Center Reply at 6-7.

²² *MDU Reconsideration Order* at para. 7.

buildings are connected to SBC fiber.²³ As a consequence, SBC and other ILECs must build out their fiber networks to meet expanding demand, just as CLECs do. In so doing, ILECs face the same entry barriers as CLECs (indeed, CLECs may have certain advantages in deploying broadband facilities, such as lower labor costs and superior backend systems). Likewise, SBC believes that section 706 considerations apply no less to predominantly commercial than to predominantly residential buildings.

But even assuming *arguendo* that unbundling relief should be limited to residential customers, AT&T's argument collapses. In the *MDU Reconsideration Order*, the Commission grappled with the fact that some buildings house both residential and enterprise customers. By concluding that unbundling of fiber to predominantly residential buildings should not be required, the Commission engaged in precisely the sort of line drawing permitted, if not compelled, by *USTA II*. Indeed, AT&T is well aware of that. In its own comments, submitted just three weeks ago in the *Triennial Review Remand Proceedings*, AT&T argued that "administrability concerns justify any slight over- or under-inclusiveness of [unbundling] rules."²⁴ In this case, the rules are both underinclusive and overinclusive. Unbundling continues to be required as to residential customers in predominantly commercial buildings, whereas unbundling is not required as to enterprise customers residing in predominantly residential buildings. The Commission's decision to classify the building based on its predominant use was an eminently reasonable way to establish an administratively feasible way to address mixed use structures.

Finally, AT&T's make weight claim that the "predominantly residential" test is too vague, and could encourage ILECs to assert that virtually any building with a residential unit meets the standard, does not justify the Commission reversing course. Apart from being wholly speculative, in most instances, the predominantly residential or commercial nature of a property

²³ Reply Comments of SBC Communications Inc., WC Docket No. 04-313, CC Docket No. 01-338 at 26 (filed Oct. 19, 2004).

²⁴ AT&T Comments, WC Docket No. 04-313, CC Docket No. 01-338, October 4, 2004 at 26 (filed Oct.).

will be clear on the facts, as the Commission aptly observed.²⁵ Moreover, the Commission provided several, helpful examples of what types of building would or would not qualify to elucidate the scope of its relief from unbundling.²⁶ In light of this clear guidance, and since CLECs easily can ascertain for themselves whether or not a particular building is residential, it is unlikely that ILECs will make frivolous claims regarding the residential character of multiunit buildings.

CONCLUSION

For the foregoing reasons, the Commission should deny the petition.

Respectfully submitted,

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²⁵ *MDU Reconsideration Order* at para. 6.

²⁶ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of October 2004, I caused copies of the foregoing Opposition of SBC to AT&T Corporation Petition for Reconsideration to the following parties by pre-postage paid first-class mail.

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